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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,
Petitioner,

vs.

KING & SPALDING,
Respondent.

On Certiorari To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether King & Spalding and other large institutional law firms that are organized as partnerships are, for that reason alone, exempt from Title VII of the Civil Rights Act of 1964, and are free (a) to discriminate in the promotion of associate lawyers to partnership on the basis of sex, race or religion; and (b) to discharge those associates whom they do not admit to partnership based on reasons of sex, race or religion under an established "up-or-out" policy.

INTERESTED PARTIES

The following listed parties have an interest in the outcome of this case:

Elizabeth Anderson Hishon (Petitioner)

King & Spalding (Respondent)

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PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals is officially reported as *Hishon* v. *King & Spalding*, 678 F.2d 1022 (11th Cir. 1982), and is reproduced as Appendix A at pages A-1 through A-16. The November 25, 1980 opinion of the district court dismissing the complaint for want of jurisdiction is unofficially reported in 25 Empl. Prac. Dec. (CCH) ¶ 31,703 (N.D. Ga. 1980), and is reproduced as Appendix B at pages A-17 through A-26.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on June 17, 1982. (Appendix C, pages A-27 through A-28) A timely petition for rehearing *en banc* was denied on September 9, 1982. (Appendix D, pages A-29 through A-30) This petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, provides in pertinent part:

Definitions

> (a) The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, *partnerships*, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.
>
> (b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, . . .

Section 701(a), (b), 42 U.S.C. § 2000e(a), (b).

Unlawful Employment Practices

> (a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(a)(1), (2), 42 U.S.C. § 2000e-2(a)(1), (2).

STATEMENT OF THE CASE

Petitioner, Elizabeth Anderson Hishon, is a female lawyer who was employed by King & Spalding as an associate from 1972 until her discharge in December 1979. Her Title VII action[1] alleging that King & Spalding discriminated against her on the basis of sex in denying her promotion to partnership and by terminating her employment as an associate under an "up-or-out" policy was dismissed by the district court under Fed. R. Civ. P. 12(b)(1) on the ground that Title VII does not apply to sex discrimination by partnerships.

King & Spalding is a partnership engaged in the practice of law in interstate commerce with offices in Atlanta and Washington. Complaint ¶ 2(a). King & Spalding has more than fifty partners, and employs more than fifty other lawyers as associates and more than fifty non-lawyers in secretarial, paralegal and clerical positions. Complaint ¶ 2(b).

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[1] The district court had jurisdiction of the case under 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1331.

King & Spalding was formed in 1885. At the time the complaint was filed, King & Spalding had never admitted a woman to partnership throughout its almost 100-year history. Complaint ¶ 2(c). From 1944 until 1977, however, King & Spalding employed a woman (Ms. Antha Mulkey) as the firm's only "permanent associate."[2]

Mrs. Hishon was only the second female lawyer employed by King & Spalding. She was employed in 1972 following graduation with honors from the Columbia University School of Law. Complaint ¶ 5. The complaint alleged that petitioner was induced to accept employment by King & Spalding by the express promise and representation that she would be considered for partnership on a fair, non-discriminatory basis upon satisfactory completion of five or six years' employment as an associate. Complaint ¶ 8(c), (d). The complaint also alleged that King & Spalding made similar representations to other promising law school graduates (Complaint ¶ 8) and that such promises and representations were "terms, conditions and privileges" of petitioner's employment by King & Spalding within the meaning of § 703(a)(1) of Title VII. Complaint ¶¶ 4, 16(a).

The complaint alleged that, despite King & Spalding's promises and representations of fair and non-discriminatory treatment, King & Spalding discriminated against petitioner on the basis of sex and, in considering her promotion to partnership, refused to utilize the same standards it applied to male associates who were admitted to partnership. Complaint ¶ 17(h).

The complaint also alleged that petitioner's employment as an associate was terminated as a result of the sex discrimination practiced by King & Spalding. The same discriminatory decision to refuse to admit petitioner to partnership led automatically to her dismissal as an associate under the firm's "up-or-out" policy. Complaint ¶¶ 13, 17(c).

---

[2] See listings of King & Spalding in Martindale-Hubbell Law Directory for the years 1944-1977.

The Proceedings Below[3]

The district court imposed a stay on merits discovery and granted petitioner limited period within which to conduct discovery restricted to the "coverage" issue. 678 F.2d at 1025 (App. A-5). King & Spalding produced a written partnership agreement which performed the same function as a corporate charter. *Id.* The King & Spalding partnership agreement superseded the Georgia law of partnerships and gave King & Spalding the principal attributes of incorporation, including (1) perpetual existence, (2) a trade name "King & Spalding" which does not represent the name of any of its living partners, (3) centralized management and control by a committee that is the equivalent of a corporate board of directors, and (4) a limitation on each partner's ownership interest in the assets of the firm to the amount of his "capital account."[4]

King & Spalding objected to the majority of petitioner's discovery and, when the petitioner moved to compel under Fed. R. Civ. P. 37, the district court denied the motion, and dismissed the complaint under Rule 12(b)(1) on the ground that accepting

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[3] The Equal Employment Opportunity Commission moved to participate in the action as *amicus curiae*, and for access to the record which the district court had placed under seal. The district court granted the EEOC's motion to participate, but denied it access to the record. On appeal, the EEOC again moved for access to the record and to participate as *amicus curiae*. Although the court of appeals granted the Commission's request to participate in oral argument, it failed to rule on its motion for access to the record.

[4] The majority was "well aware that large partnerships possess many attributes common to corporate forms of business. As appellant correctly points out, the United States Supreme Court has held that partnerships have 'an established institutional identity independent of the individual partners.' *Bellis* v. *United States*, 417 U.S. 85, 95." 678 F.2d at 1026 (App. A-7).

petitioner's allegations of sex discrimination by King & Spalding as true, such discrimination was outside the coverage of Title VII because King & Spalding was organized as a partnership. The district court analogized a law partnership to a marriage and the application of Title VII to a shotgun wedding:

> In a very real sense a professional partnership is like a marriage. It is, in fact, nothing less than a 'business marriage' for better or worse. Just as in marriage different brides bring different qualities into the union—some beauty, some money, and some character—so also in professional partnerships, new mates or partners are sought and bethrothed for different reasons and to serve different needs of the partnership. Some new partners bring legal skills, others bring clients. Still others bring personality and negotiating skills. In both, new mates are expected to bring not only ability and industry, but also moral character, fidelity, trustworthiness, loyalty, personality and love. Unfortunately, however, in partnerships, as in matrimony, these needed, worthy and desirable qualities are not necessarily divided evenly among the applicants according to race, age, sex or religion, and in some they just are not present at all. To use or apply Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings.
>
> 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,062 (App. A-20).

The trial court ruled that petitioner was not entitled to go behind the common-law definition in an attempt to demonstrate that in the case of King & Spalding (as is true of many other law firms), the firm was organized and run in a manner that departed significantly from the common-law model of a "partnership," and had many attributes that more closely resembled a corporation. Judge Edenfield said:

> Undeniably, a private professional partnership is a voluntary association. . . . Plaintiff's emphasis on the composition and internal arrangements of this particular partnership cannot alter this inescapable conclusion. King & Spalding is a partnership, created and perpetuated as such and subject to the partnership laws of Georgia and the United States. The legal characterization of what an entity is, of course, is purely a question of state law, . . .
>
> These observations effectively dispose of plaintiff's prayers for further discovery.
>
> 25 Empl. Prac. Dec. (CCH) ¶ 31,703, at 20,062 (App. A-19).

In dismissing the complaint under Rule 12(b)(1) for want of subject-matter jurisdiction, the district court was heavily influenced by what it conceived to be the infringement of rights of "freedom of association" of King & Spalding's existing partners that would result if the firm were subjected to the coverage of Title VII and prohibited from using race, sex and religion as criteria in the selection of partners. The district court felt that it was confronted with a "dilemma" between construing Title VII to cover partnership decisions of large law firms on the one hand - a question which the court concluded was "doubtful and obscure" - and the possibility that "the right of defendant to freedom of association" would be violated if Title VII were applied to its process of selecting partners from among its associates. *Id.* at 20,064 (App. A-24). The court resolved the dilemma by deciding the "doubtful and obscure" question of coverage of Title VII over law firm partnerships against the petitioner, but with the observation that "the court is humbly aware that in reaching this conclusion it may have erred." *Id.*

The district court described its dilemma in the concluding paragraph of the opinion:

> In the end, then, the court faces this dilemma: (1) If the court finds that the case is covered by Title VII the defendant's constitutional right to freedom of association is then thrown into head-on conflict with plaintiff's constitutional right not to suffer discrimination in the terms, conditions and privileges of her employment; (2) if the court construes the Act as not covering plaintiff's claim, then there is no constitutional problem and the court should dismiss the case for want of subject-matter jurisdiction. To the court, while the right of defendant to freedom of association seems clear, the coverage of the Act seems doubtful and obscure. The court is humbly aware that in reaching this conclusion it may have erred. In considering this possibility, the court considered a balancing process which would give effect to both constitutional rights by allowing the case to proceed but would require the plaintiff, in such rare instances, to show by clear and convincing proof that, irrespective of all other justifications claimed by defendant, naked discrimination was the sole and producing cause of plaintiff's rejection as a partner. The court, however, could find no hint of any authority for a trial court to so alter the burden of proof. All of these questions will have to be resolved by a higher authority, legislative or judicial. In the meantime, the court concludes that it has no subject-matter jurisdiction of plaintiff's claim and the case is, therefore, DISMISSED.
>
> *Id.* (App. A-24, A-25).

On appeal, a divided panel of the Eleventh Circuit Court of Appeals affirmed, with Circuit Judge Peter T. Fay and Senior District Judge George C. Young in the majority, and Circuit Judge Gerald B. Tjoflat dissenting. *Hishon* v. *King & Spalding*, 678 F.2d 1022 (11th Cir. 1982). The majority ruled:

> A dismissal under Fed.R.Civ.P. 12(b)(1) is proper only when 'it appears beyond doubt that the plaintiff can prove

> no set of facts in support of [her] claim, which would entitle [her] to relief.' *McLain* v. *Real Estate Board of New Orleans, Inc.* . . . Appellant suggests that Title VII must be given the 'broadest possible interpretation' in order to effectuate its purpose - to remedy acts of discrimination within the employment context. *Rogers* v. *EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972). . . . Even under the most liberal reading we cannot find the requisite congressional intent to permit Title VII's intervention into matters of voluntary association. We can conceive no set of facts which would entitle her to relief under Title VII with respect to partnership decisions. This renders the dismissal of her claim proper.
>
> 678 F.2d at 1026 (App. A-6).

Although the majority opinion refrained from expressly endorsing the freedom of association rationale of the trial court, it was heavily influenced by the notion that a partnership is a "voluntary association," and that partners of a "voluntary association" should be free to select those with whom they will "associate" in the practice of law in the absence of clear evidence of "the requisite congressional intent to permit Title VII's intervention into matters of [discrimination by] voluntary association[s]." *Id.*

Judge Tjoflat dissented on the ground that Title VII applies to petitioner's firing as an associate as a direct consequence of King & Spalding's decision to refuse her admission to partnership. Since this decision was alleged to have been based on sex, her firing, therefore, constituted employment discrimination in violation of §§ 703(a)(1) and 703(a)(2) of Title VII. 678 F.2d at 1030 (App. A-15, A-16).

Petitioner's motion for rehearing *en banc* was denied on September 9, 1982 (App. A-29, A-30).[5]

[5] Nine of the twelve active judges of the Eleventh Circuit may have disqualified themselves. Two judges served with Griffin B. Bell (now a member of King & Spalding) when Judge Bell was a member of the former Fifth Circuit. Seven other judges of the Eleventh Circuit were appointed by President Carter during the period that Judge Bell was Attorney General, and another King & Spalding partner, Charles Kirbo, was an unsalaried presidential adviser. *First Friend,* Newsweek, Jan. 24, 1977, at 24. Only three members of the court, Judges Tjoflat, Fay and Hill, were appointed after Judge Bell's resignation, and before his appointment as Attorney General.

ARGUMENT

In 1979, 15 years after the passage of Title VII, 90 of the 200 largest law firms in the United States (including King & Spalding) had no women partners; 67 other firms had only one woman partner. Epstein, *The Partnership Push*, SAVVY 29, 35 (March 1980). Whether Title VII covers the partnership decisions of large institutional law firms presents an important issue of federal law that has never been, but should be, reviewed by this Court.

First, the decision grants blanket exemption from Title VII to businesses, including most large law firms and accounting firms, that are nominally organized as partnerships. The decision affects a large segment of the economy and therefore represents a significant retreat in the enforcement of Title VII. *Second*, the decision below is particularly harmful because it encourages discrimination by large institutional law firms which historically have been bastions of discrimination. *Third*, prior decisions of the lower federal courts have held that Title VII prohibits discrimination by law firms in the hiring of associates. *Kohn* v. *Royall, Koegel & Wells*, 496 F.2d 1094 (2d Cir. 1974); *Blank* v. *Sullivan & Cromwell*, 418 F. Supp. 1 (S.D.N.Y. 1975). In *Lucido* v. *Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977), the court held that a law firm's partnership decisions were also covered by Title VII. Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945 (1982); Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of A Law Partner*, 76 Mich. L. Rev. 282 (1977). The ruling of the lower court in this case, however, leaves women, blacks and other minorities unprotected from discrimination in seeking advancement from the entry level associate positions to the more lucrative job opportunities which are available only to partners in large law firms. *Fourth*, the ruling has the effect of placing lawyers above the laws prohibiting employment discrimination, a position that is not available to those who engage in most other businesses.

A. The Issue Is Novel And Has Never Been Previously Decided By This Court.

Whether Title VII covers the partnership decisions of law firms has never been previously considered by this Court. Although it has long been recognized that Title VII covers employment discrimination by law firms in the hiring of associates, whether Title VII applies to partnership decisions has been directly ruled upon only by the divided opinion of the court of appeals in this case and by the district court in *Lucido* v. *Cravath, Swaine & Moore,* 425 F. Supp. 123 (S.D.N.Y. 1977). Because most law firms, large accounting[4] and stock brokerage firms are organized, at least nominally, as "partnerships," as is King & Spalding, the ruling below has the effect of restricting employment opportunities of women, blacks and religious minorities in significant segments of the economy.

The complaint alleged that Title VII applied to the employment discrimination practiced by King & Spalding against Mrs. Hishon under three distinct legal theories.

1. **The entity theory** - The complaint alleged that a large partnership is a separate legal entity from its partners and, therefore, should be considered as an "employer" of the partners. *See Bellis* v. *United States,* 417 U.S. 85, 95 (1974) (holding a dissolved 3-man law partnership to be an entity separate from its former partners); *Armstrong* v. *Phinney,* 394 F.2d 661 (5th Cir. 1968) (applying the entity theory, court held a partnership to be the "employer" of a 5% partner for tax purposes). This conclusion is reinforced where the partnership has a written partnership agreement like King & Spalding's, that modifies the common law of partnerships, and gives the organization the principal attributes of incorporation, including perpetual duration and centralized management, and limits a partner's share of assets of the partnership to his invested capital in his individual capital account.

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[4] Wayne, *The Year of the Accountant,* N.Y. Times, Jan. 3, 1982, § 3, at 1, col. 2.

The economic reality of the relationship between a partner and a large institutional law firm is that it is primarily one of employment in which the partner earns a livelihood by performing services for clients of the firm. Although a partner may also be a nominal owner of the firm, his compensation is based on earnings derived from his labor, and not as a return on invested capital. In any event, this Court has held that an owner of the enterprise may also be an "employee" for federal regulatory purposes because there is nothing "inconsistent between the coexistence of a proprietary and an employment relationship." *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28, 32 (1961). *See also Bonilla* v. *Oakland Scavenger Co.*, ____ F.2d ____, 51 U.S.L.W. 2301 (9th Cir. Nov. 9, 1982) ("The company's organization closely entangles stock ownerships and employment privilege, but the predominant characteristics are those of employment.").

The majority recognized the force of petitioner's argument that "the Firm" should be considered as the "employer" of its partners, but refused to accept the conclusion that a large, impersonal partnership should be treated on a parity with corporations for purposes of Title VII. The majority stated:

> We are well aware that large law partnerships possess many attributes common to corporate forms of business. As appellant correctly points out, the United States Supreme Court has held that partnerships have 'an established institutional identity independent of its individual partners.' *Bellis* v. *United States*, 417 U.S. 85, 95, 94 S.Ct. 2179, 2187, 40 L.Ed.2d 678 (1974) (individual partner's fifth amendment privilege held inapplicable to prevent production of partnership records). For many purposes, such as the fifth amendment's protection, this 'separate identity' will yield results similar to those for corporations, but not for Title VII purposes.
>
> 678 F.2d at 1026 (App. A-7).

2. **Promotion was a "term, condition or privilege of employment" or an "employment opportunity."** - The complaint specifically alleged that to induce Mrs. Hishon to accept an offer of employment, King & Spalding expressly represented to her, as it did to all of its prospective associates, that she would be fairly considered for promotion to partnership on a non-discriminatory basis after five years' employment. This opportunity was not one which King & Spalding offered to everyone engaged in the practice of law, but only to those whom it was attempting to recruit and induce to accept employment by the firm. The representations by King & Spalding that it would offer each associate the opportunity to become a partner on a non-discriminatory basis was, therefore, a "term, condition or privilege [of Mrs. Hishon's] employment" as an associate, within the meaning of § 703(a)(1), and an "employment opportunity" within the meaning of § 703(a)(2) of Title VII.

Prior to the ruling in this case, courts had uniformly held that an employee's right to be considered for promotion on a non-discriminatory basis *is* covered by federal employment legislation, even if the employee would not be covered after the promotion. *See, e.g., Lucido* v. *Cravath, Swaine & Moore,* 425 F. Supp. 123 (S.D.N.Y. 1977); *NLRB* v. *Bell Aircraft Corp.,* 206 F.2d 235 (2d Cir. 1953) ("immaterial that the protection . . . afforded was calculated to enable him to obtain a position in which he would no longer be protected"). *See also Golden State Bottling Co.* v. *NLRB,* 414 U.S. 168 (1973); *Bonilla* v. *Oakland Scavenger Co.,* ____ F.2d ____, 51 U.S.L.W. 2301 (Nov. 9, 1982) ("Since the company ties preferential wages, hours, and job assignments to ownership of its stock, a shareholder preference plan constitutes a condition of employment subject to the mandate of Title VII."); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211 (5th Cir. 1974). The majority again recognized the force of petitioner's argument, but once again in an *ipse dixit* declined to accept the conclusion which flowed inevitably from that acceptance.

> We have no quarrel with the premise that an 'opportunity' can include promotion to a position beyond that of an 'employee' covered by Title VII. But, once again, we decline to extend the meaning of 'employment opportunities' beyond its intended context by encroaching upon individuals' decisions to voluntarily associate in a business partnership.
>
> * * *
>
> Decisions as to who will be partners are not within the protection of Title VII.
>
> We do have serious concerns about any representations made to the appellant regarding her future consideration for partnership. We are well aware of the significance given a firm's partnership policy by a prospective associate in determining the proper career choice. If in fact these representations are deceptively made, then perhaps an action in breach of contract or misrepresentation may provide a more appropriate vehicle for the appellant to drive toward a legal remedy.
>
> 678 F.2d at 1028-29 (App. A-11, A-13).

The majority failed to explain how a representation of nondiscriminatory promotional consideration could support "an action in breach of contract or misrepresentation," without also supporting an action under Title VII based on the discriminatory denial of a "term, condition or privilege of employment" under § 703(a)(1), or an "employment opportunity" under § 703(a)(2).

3. **Discharge as an employee was caused by discriminatory denial of promotion to partnership.** - The complaint alleged and King & Spalding admitted that it terminated Mrs. Hishon's employment under an "up-or-out" policy. Under the policy, when King & Spalding discriminated against Mrs. Hishon by refusing to promote her to partnership based on sex, the firm

simultaneously decided to terminate her employment as an associate. Her subsequent firing was the direct result of discrimination based on sex and its effect was to "deprive [Mrs. Hishon] of employment opportunities [and] otherwise directly affect [Mrs. Hishon's] status as an employee" of King & Spalding, in violation of the literal language of § 703(a)(2) of Title VII. *Lucido* v. *Cravath, Swaine & Moore*, 425 F. Supp. at 123. *Compare, Bonilla* v. *Oakland Scavenger Co., supra.*

The majority, over the strong dissent of Judge Tjoflat, dismissed this claim as a "back-door" attempt to obtain Title VII coverage of the partnership decision. 678 F.2d at 1029-30 (App. A-14, A-15, A-16).

B. The Decision Below Has Interpreted Title VII Narrowly And In A Manner That Conflicts With The Intention Of Congress, Prior Decisions Of This Court Interpreting Title VII, And Prior Decisions Of This Court Interpreting Other Federal Statutes Regulating Employment.

The lower court's majority opinion reflects an extreme reluctance to apply Title VII to law firms in the same manner that Title VII has been applied to other occupations. *See* Bartholet, *Application of Title VII to Jobs in High Places*, 95 Harv. L. Rev. 945 (1982). The majority placed primary emphasis upon the common-law concept of partnership as a "voluntary association," but in doing so, "conceal[ed] from themselves the real-life fact that lawyers earn their livelihood at the bar" (*Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977)) from their personal labor on behalf of clients of "the Firm." The majority placed a higher value on the right of the existing partners to maintain a "voluntary association" based on race, sex or other invidious criteria and relatively little value on the rights of thousands of women, blacks or Jews who are employed as associates in law firms to pursue professional job opportunities free of discrimination.

The majority's restrictive interpretation of Title VII constitutes a significant retreat in the battle against employment discrimination, not only in blue-collar positions, but also in the professions. This retreat cannot be reconciled with the decisions of this Court.

First, the majority's narrow view of Title VII does not reflect the intent of Congress. This Court has held that "in enacting Title VII of the Civil Rights Act of 1964 Congress intended to prohibit *all practices* in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin [citations] and ordained that its policy of outlawing such discrimination should have the 'highest priority.' " *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 763 (1976). There is no doubt that Congress intended to outlaw discrimination in the professions for, as this Court emphasized only last term, "Congress required 'the removal of artificial, arbitrary, and unnecessary barriers to employment' and *professional development* that had historically been encountered by women, blacks and other minorities." *Connecticut* v. *Teal,* ____ U.S. ____, 50 U.S.L.W. 4716 (June 21, 1982) (No. 80-2147) (emphasis supplied).

Second, the majority's interpretation of Title VII so as to preclude its coverage of partnership decisions judicially creates an exception to the application of Title VII that Congress chose not to include in the statute. This Court has held that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 616-17 (1980); *Continental Casualty Co.* v. *United States,* 314 U.S. 527, 533 (1942). Congress specifically enumerated various exceptions to Title VII's prohibition of employment discrimination, exempting, for example, employers having fewer than fifteen employees (42 U.S.C. § 2000e(b)), and persons elected to public office (42 U.S.C. § 2000e(f). There has been no showing in this case of a legislative intent to create an additional exception for partnerships. *See also Bonilla* v. *Oakland Scavenger Co., supra.*

Third, while the majority gave lip service to this Court's many decisions which have held that Title VII "must be given the 'broadest possible interpretation' " (678 F.2d at 1026, App. A-6), it nonetheless used the common-law concept of partnership as a "voluntary association" to interpret Title VII very narrowly and ignored the economic reality of the relationship betweenan individual partner and the very large, impersonal law firm.

Fourth, the majority's approach to the interpretation of Title VII was directly contrary to the approach mandated by the decisions of this Court. The majority placed upon the petitioner the burden of demonstrating from the legislative history that Congress discussed the subject of discrimination by law firms and other partnerships and specifically intended to cover partnership decisions. Finding an absence of positive evidence of "the *requisite* congressional intent" (678 F.2d at 1026, App. A-6 (emphasis supplied)), the majority presumed that Congress intended to leave discrimination by law parternships and other voluntary associations in the selection of partners untouched by Title VII's otherwise comprehensive prohibitions against discrimination in the workplace. The majority thus disregarded the teaching of *County of Washington* v. *Gunther,* 452 U.S. 161 (1981), in which this Court explained that, because Title VII was "intended to be broadly inclusive" [*id.* at 170], the lower federal courts "must therefore *avoid interpretations* of Title VII that deprive victims of discrimination of a remedy, *without clear congressional mandate.*" *Id.* at 178 (emphasis supplied).

Fifth, in holding that the terms "employer," "employee" and "employment" in Title VII did not encompass the relationship between a partner and a law firm, the majority implicitly rejected decisions of this Court that have interpreted those terms liberally. There can be no doubt that Congress specifically intended Title VII to reach all forms of job discrimination, including the employment practices of partnerships. "Partnership" is expressly included in the definition of the term

"employer" in § 701(a) (quoted *supra* p. 1). Moreover, when Congress enacted Title VII, it used the same broad definitions of the terms "employer" and "employee" that had been used in the National Labor Relations Act, the Social Security Act and the Fair Labor Standards Act. In three important cases which preceded the enactment of Title VII, this Court applied an "economic reality test" to require that the term "employee" as used in each of these three statutes be given the comprehensive definition, and rejected attempts to narrow the scope of these statutes by use of restrictive common-law concepts of the employer-employee relationship. *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944) (National Labor Relations Act); *United States* v. *Silk*, 331 U.S. 704 (1947) (Social Security Act); *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961) (Fair Labor Standards Act).

In *NLRB* v. *Hearst Publications, Inc.*, for example, this Court emphasized that:

> Congress recognized those economic relationships cannot be fitted neatly into the containers designated 'employee' and 'employer' which an earlier law had shaped for different purposes . . .
>
> * * *
>
> In this light, the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee,' 'employer,' and 'labor dispute,' leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications.
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> 322 U.S. at 128-29.

Moreover, in *Goldberg* v. *Whitaker House Cooperative*, which was decided only three years before the passage of Title VII, this Court held that an "owner" of a cooperative could also be con-

sidered an "employee" if the economic reality of the relationship was that she worked for the organization. The Court explained that "ownership" and "employee" status were not mutually exclusive:

> There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship. If members of a trade union bought stock in their corporate employer, they would not cease to be employees within the conception of the Act. . . . We fail to see why a member of a cooperative may not also be an employee of the cooperative. In this case the members seem to us to be both 'members' and 'employees.' It is the cooperative that is affording them 'the opportunity to work, and paying them for it, . . .
>
> 366 U.S. at 32.

It is well established that when Congress uses the same term (*i.e.*, "employee") in a later statute that it had used in earlier statutes regulating the same general subject (in this case, employment), and the term in the earlier statutes have been the subject of Supreme Court interpretations at the time the later statute was enacted, as was true in the case of Title VII, it is presumed that Congress was aware of this Court's interpretations and intended to adopt this Court's construction of those terms. *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them."); *Hargrove* v. *Oki Nursery, Inc.*, 646 F.2d 716, 720 (2d Cir. 1981) ("Use of the same language in various enactments dealing with the same general subject matter [*i.e.*, employment] . . . is a strong indication that the statutes should be interpreted to mean the same thing.").

The majority ignored *Cannon* and pretended to interpret the term "employment" according to its common, every-day meaning, 678 F.2d at 1027 (App. A-8, A-9). It, however, ignored the definition of "employment" in *Webster's Third New International Dictionary* 743 (1976) as "activity in which one engages and employs his time and energies," and "work . . . in which one's labor or services are paid for by an employer." Furthermore, while recognizing that this Court's prior cases established an "economic reality test" of employment (678 F.2d at 1027 n.9, App. A-9), it refused to accept the conclusion that flows inevitably from the application of such a test - that economic reality of the relationship between a partner and a large law firm is one of employment. The majority elected, instead, to deny coverage under Title VII by utilizing the narrow concept of partnership derived from the common-law that "The very essence of a partnership is the voluntary joinder of all partners with each other." 678 F.2d at 1028 (App. A-10).

Sixth, the majority's interpretation of Title VII conflicts with the position of the Equal Employment Opportunity Commission that Title VII applies to a law firm's partnership decision. *See* Amicus Brief of EEOC (filed with the court of appeals on March 23, 1981). "When faced with a problem of statutory construction, this Court [has shown] great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Because the EEOC is the administrative agency empowered by Congress to enforce, interpret, and administer Title VII, "that respect which is customarily given to a practical administrative construction of a disputed provision" (*Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 408 (1961)), should be accorded to the EEOC's interpretation of Title VII. *County of Washington* v. *Gunther*, 452 U.S. 161, 177-78 (1981); *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

Seventh, it is obvious that the majority was blinded by the same discredited notions that influenced the trial court - that partners in a large institutional law firm such as King & Spalding possess a cognizable legal right of "voluntary association" that transcends Title VII's prohibitions of employment discrimination. "Voluntary association" as used by the lower court was simply a code for the right to discriminate and *not* to work with women, blacks, Jews or other minorities as equals in the practice of law. This pernicious premise infected the reasoning of the majority and is directly refuted by this Court's ruling in *Runyon* v. *McCrary*, 427 U.S. 160, 176 (1976), which emphasized that " 'the Constitution . . . places no value on discrimination' . . . and while '[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protection."

C. Discrimination By Law Firms Has Been A Historic Problem.

Although the legal profession has as its motto "Equal Justice Under Law," it is no secret that many of the large law firms throughout the United States have for many years practiced overt discrimination against the employment of women, Jews, blacks and other minorities. *See* C. Epstein, *Women in Law* 82 (1981); P. Hoffman, *Lions in the Street* 11-12 (1973).

King & Spalding is not atypical of many other large law firms. In his recent book, Morris Abram described "the awful and inescapable reality that no Jew had ever been employed by that firm, now the renowned King & Spalding of Griffin Bell and Charles Kirbo." M. Abram, *The Day is Short* 62, 95 (1982).

Judge Phyllis Kravitch of the Eleventh Circuit had a similar experience. Although King & Spalding was not mentioned by name, her experience upon graduation from the University of Pennsylvania Law School has been described as follows:

> After graduating from the University of Pennsylvania Law School in 1943, one of two women in the class, she was lucky to find a place to practice law - her father's firm in Savannah. At the time, most law firms didn't hire women - not even good students like Judge Kravitch, who had been on the editorial board of the school's law review. Prestigious judicial clerkships were also closed to women then. 'When I started practicing law,' says Judge Kravitch, 'the doors were not only closed, they were locked.'
>
> Goolrick, *Equality Under the Law?,* Atlanta J. & Const., June 8, 1980 (Atlanta Weekly Magazine), at 16, col. 3.

Petitioner was only the second woman associate employed by King & Spalding in its almost 100-year history. Martindale-Hubbell reflects that the first woman employed by King & Spalding (Ms. Antha Mulkey) was employed in 1944. Although Ms. Mulkey was sufficiently well qualified to practice law at King & Spalding, she remained in the employ of the firm *for 33 years as its only permanent associate,* while more than fifty less experienced male associates employed after Ms. Mulkey were regularly promoted over her into partnership.

The attitude of King & Spalding, as well as other law firms, toward the employment of women lawyers is a reflection of a widely-shared attitude toward women in the legal profession that was expressed by Mr. Justice Bradley in the *Myra Bradwell* case, in which this Court upheld the right of Illinois to exclude women from the practice of law:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is

> founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . This very incapacity was one circumstance which the supreme court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counselor.
>
> It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.
>
> *Bradwell* v. *Illinois*, 83 U.S. 130, 141 (1873).

D. **The Decision Below Affects A Significant Segment Of The Economy.**

The exemption of partnerships from Title VII at least perpetuates, if it does not encourage, continued employment discrimination in the upper echelons of the legal and accounting professions, which impact significant segments of the economy.

This Court has recognized that "*some of the most powerful private institutions in the Nation are conducted in partnership form. Wall Street law firms* and stock brokerage firms provide significant examples. These are often large impersonal, highly structured enterprises of essentially perpetual duration." *Bellis* v. *United States*, 417 U.S. 85, 93-94 (1974) (emphasis supplied).

The Big Eight national accounting firms are also organized as partnerships. The largest in terms of number of partners (Coopers & Lybrand) has 2,010 partners worldwide and 1981 revenues of $998 million. The smallest of the Big Eight (Arthur Andersen & Co.) has 1,400 partners and 1981 revenues estimated over $973 million. *See Wayne, The Year of the Accountant,* N.Y. Times, Jan. 3, 1982, § 3, at 1, col. 2.

Although smaller than the Big Eight accounting firms, the major law firms in the United States represent centers of economic and political power far out of proportion to their numbers of their contributors to the GNP. *See* J. Goulden, *The Superlawyers* (1972); P. Hoffman, *Lions in the Street* (1973). King & Spalding's high profile during the Carter Administration[7] is typical of the influence wielded by many other large institutional law firms in New York, Washington, and in state capitals throughout the Nation.

The effects of the lower court's endorsement of continued discrimination by King & Spalding and other large partnerships cannot be dismissed as inconsequential. There are more than 29,000 law partnerships in the United States. U.S. Bureau of the Census, Statistical Abstract of the United States 184, Chart No. 317 (102d ed. 1981). In 1977, the legal profession was an 18.7 billion dollar industry of which $10,093,000,000 was received by partnerships. *Id.*

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[7] Numerous articles and other press stories were written about King & Spalding and its connection with members of the Carter Administration. *See, e.g.,* Reuters Ltd., Dateline: Atlanta, June 19, 1979 (" . . . King & Spalding, one of the best connected law firms in the country . . ."; "King & Spalding, with 107 lawyers, is not the city's largest firm, but its corporate and social ties are perhaps the most venerable."); *The First Friend,* Newsweek, Jan. 24, 1977, at 24 (" . . . King & Spalding, a Southern gentlemanly law firm in Atlanta . . . ").

In 1982, the law firms included in the National Law Journal's list of the Top 200 law firms employed a total of 16,683 associates. These firms ranged in size from Chicago's Baker & McKenzie, which has 236 partners and 377 associates, and operates 28 offices in the United States and in foreign countries, to Boston's Herrick & Smith, which has 80 lawyers. *The Top 200 Law Firms,* National Law Journal, September 13, 1982, at 14, 16, 18-19, September 20, 1982, at 13-16. In 1979, King & Spalding ranked 97th, in 1980 106th, in 1981 98th, and in 1982 115th among the Top 200 law firms in total numbers of lawyers. *Id.;* National Law Journal, October 6, 1980, at 32-37, October 13, 1980, at 34-38.

Furthermore, law firms are big business relative to the size of most other businesses that are covered by Title VII. In absolute terms, King & Spalding had more lawyers in 1980 (102) than the number of employees of 98% of all business "establishments" in the United States, as defined by the Bureau of the Census. Disregarding the secretarial, paralegal and clerical workers employed by King & Spalding that number in excess of 50, King & Spalding has more lawyers than 92% of the "establishments" in the United States that have 15 or more employees and, therefore, meet the "size of business" test of Title VII. 42 U.S.C. § 2000e(b). Even if only the number of associates employed by King & Spalding (50) is considered, King & Spalding was larger than 77% of the "establishments" in the United States that are covered by Title VII.[9]

E. Coverage Of Title VII In This Case Will Help To Eradicate The Discrimination That Still Exists In The Upper Echelons Of The Legal Profession.

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[9] U. S. Dept. of Commerce, Bureau of Census, *County Business Patterns - United States,* Table 1B - United States - Establishments, Employees and Payroll by Industry by Employment - Size Class: 1977.

The enactment of Title VII marked a turning point in the employment of women in the legal profession. In 1964, there were fewer than 2,200 women (4%) enrolled in accredited law schools. Ten years later, the number of women law students had increased ten-fold to 21,788 (21%). By 1981, the number had reached 44,986 or 35% of the total law school enrollment. Asso. of Am. L. Sch., *Prelaw Handbook 1982-83* 11 (1982).

The objective evidence indicates that women as a group are as well qualified as men, intellectually and academically, to practice law. A 1972 survey of eight leading law schools found that 53% of the women, and only 35% of the men, enrolled in law school graduated in the top 10% of their undergraduate classes. Stevens, *Law Schools and Law Students,* 59 Va. L. Rev. 572 (1973). In fact, a study of LSAT scores reflects that during each year from 1969-73, median LSAT scores of women were consistently *higher* than those of their male counterparts. L. Wightman, *Male-Female LSAT Candiate Study 1969-73,* Educational Testing Service (1974). *See also* C. Epstein, *Women in Law* 56-57 (1981); Barber, *Employment Discrimination Against Women Lawyers,* 59 A.B.A.J. 1029 (Sept. 1973).

Despite the objective evidence that women are as well qualified as men to practice law, the employment of women in the legal profession has trailed far behind their enrollment in law schools. In 1972, eight years after the enactment of Title VII, and the year Mrs. Hishon was employed by King & Spalding, women comprised only 3.8% of the total number employed as lawyers or judges in the legal profession. U. S. Bureau of Census, Statistical Abstract of the United States 402, Chart No. 675 (102d ed. 1981). In 1974 and 1975, the Second Circuit and several district courts upheld sex discrimination claims filed by women lawyers against law firms that, like King & Spalding, were organized as partnerships. ***Kohn*** v. ***Royall, Koegel & Wells, supra; Blank*** v. ***Sullivan & Cromwell, supra.*** Largely as a result of these decisions, the number of women employed in the legal profession increased more than three-fold

in the next eight years, to 12.8% in 1980. U.S. Bureau of Census, Statistical Abstract of the United States 402, Chart No. 675 (102d ed. 1981). A large percentage of these women are employed as associates in law firms. C. Epstein, *Women in Law* 53 (1981).

The combined effect of increased numbers of women admitted to law schools and decisions holding Title VII to prohibit discrimination by law firms against the employment of women as associates has been to expand job opportunities available to women in lower echelons of the legal profession. The upper echelon partnership positions remain closed to women at many law firms or are available only on discriminatory terms to the exceptional "Superwoman." *See* C. Epstein, *Women in Law* 175-218 (1981).

CONCLUSION

Many women, blacks and other minorities owe their admission to law schools and subsequent employment by law firms to Title VII. The decision below expressly allows large law firms to discriminate against those associates who are women, blacks or religious minorities when it comes to the process of selecting from among the associates employed by the firms those who will be made partner. For women, blacks and other minorities enrolled in law schools or employed as associates in law firms, the decision by the lower court is their *Dred Scott* case. It is incompatible with this Court's prior decisions interpreting Title VII and signals a major setback in the fight to eliminate discrimination in the professions.

A writ of certiorari should, therefore, be granted to review, and ultimately reverse, the decision below.

Respectfully submitted,

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APPENDIX A

Elizabeth Anderson HISHON,
Plaintiff-Appellant,

v.

KING & SPALDING, a Partnership,
Defendant-Appellee.

No. 80-9021.

United States Court of Appeals,
Eleventh Circuit.

June 17, 1982.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT and FAY, Circuit Judges, and YOUNG*, District Judge.

FAY, Circuit Judge:

A voluntary association of two or more persons established for the purpose of engaging in a common enterprise has traditionally been known as a partnership. It is from within this framework this Court now confronts a novel question of jurisdiction under Title VII. Elizabeth Anderson Hishon filed a Title VII action against King & Spalding, a law firm, alleging that it discriminated against her on the basis of sex in its refusal to invite her into its partnership. After considering lengthy and detailed memoranda, Judge Newell Edenfield of the Northern District of Georgia, held Title VII inapplicable to partnership decisions, leaving the District Court without subject matter

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* Honorable George C. Young, U. S. District Judge for the Middle District of Florida, sitting by designation.

jurisdiction of the claim. Judge Edenfield dismissed the case under Fed.R.Civ.P. 12(b)(1).[1] The plaintiff appeals the District Court's ruling and provides us with a myriad of creative reasons why the particular partnership in issue here should be subject to the protection afforded "employees" by Title VII. While the arguments are appealing and discrimination in any form must not be tolerated, we cannot overlook the essence of a partnership—voluntary association. We are therefore compelled to reject the corporate characterizations of King & Spalding set forth by the plaintiff, and hold that Title VII does not apply to decisions regarding partnership. We affirm the District Court's dismissal.

In 1972, Elizabeth Hishon accepted a position as an associate with King & Spalding. King & Spalding is a large Atlanta law firm which operates as a general partnership. The partnership consists of approximately fifty active lawyers and employs approximately fifty additional lawyers as associates. At the time the plaintiff became an associate with the firm, consideration for partnership occurred at the end of an associate's sixth year. The firm also maintained an "up or out" policy. Under this policy, if the partnership did not invite an associate to become a partner after the requisite time, the associate was allowed to remain with the firm only for such reasonable period as necessary to secure other employment.

In May, 1978, the partnership considered Ms. Hishon, along with other associates hired at the same time, and decided not to invite her to join the partnership.[2] She was promptly notified,

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[1] In rendering his decision, the trial judge additionally dealt with the plaintiff's motion to compel discovery. In view of his decision to dismiss the case, the request for further discovery was denied.

[2] It is significant to note that the partnership made the same decision with respect to two male associates, while other male associates within the group were invited to join the partnership.

and was extended the normal period of time to secure other employment. Eight months later, Ms. Hishon requested reconsideration for partnership. At the conclusion of the May, 1979, partnership meeting, the result was the same—Ms. Hishon was not invited into the partnership.[3] Again the partnership notified her of the outcome. Ms. Hishon left the firm on December 31, 1979.

Prior to her departure from the firm, Ms. Hishon filed a sex discrimination claim with the Equal Employment Opportunity Commission. Within ten days the Commission issued a Notice of Right to Sue, and Ms. Hishon filed her complaint in District Court within the statutory 90-day period.

The complaint contained three counts. The first count, the only one considered by the District Court, alleged sex discrimination in the firm's decision not to make her a partner.[4]

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[3] The parties vigorously dispute the nature of the May, 1979, decision. King & Spalding claims the partnership voted not to reconsider Ms. Hishon for partnership and that the decision not to invite her was made in 1978. Ms. Hishon claims, however, that King & Spalding reconsidered and revoted on the partnership issue at its May, 1979, meeting. In its motion to dismiss, King & Spalding argued that since the partnership decision had been made in May, 1978, Ms. Hishon had exceeded the 180-day filing deadline for employment discrimination suits. 42 U.S.C. § 2000e-5(e) (1976); *Bickham* v. *Miller*, 584 F.2d 736 (5th Cir. 1978). Because we find Title VII inapplicable, the argument no longer retains its vitality and the disputed issue is of little consequence.

[4] The complaint contained numerous instances of alleged sex discrimination within the plaintiff's seven and one half years of association with the firm. During oral argument the panel questioned whether the plaintiff inteded to pursue individual claims of discrimination under Title VII regardless of the outcome of this ap-

(Footnote 4 continued)

peal. Subsequent correspondence from plaintiff's counsel relieves this Court of its initial concern.

In a letter dated January 18, 1982, counsel for King & Spalding informed this Court that all parties had expressly agreed with the District Court to limit its ruling to the threshold jurisdictional issue now presented on appeal. The suggestion, in fact, had been made originally by Ms. Hishon's counsel in an earlier letter:

> If King & Spalding were to prevail on this threshold question, discovery on the merits aimed at establishing that it has in fact discriminated against women and other minorities in its employment, promotion and compensation decisions, as well as discovery into matters of partner compensation for the purpose of establishing damages under Title VII, would be moot.

Letter from Emmet J. Bondurant to Judge Newell Edenfield (March 31, 1980); Record at 82-84.

A subsequent letter from Ms. Hishon's counsel, dated January 25, 1982, confirms the limited area of inquiry and the plaintiff's intention to focus on the partnership question alone.

> Appellant did not intend to assert separate claims based on each individual episode of sex discrimination practiced against her as an employee that is alleged in the complaint. If the case is reversed and remanded for trial under one or more of the three legal theories referred to above, plaintiff does intend, however, to prove the acts of discrimination practiced against her as an associate as evidence of the existence of a continuing pattern and practice of discrimination on the part of King & Spalding, as evidence that she had diminished opportunities to demonstrate that she was partnership material as compared to her male counterparts who were more favorably treated, and as evidence that King & Spalding's ultimate decision to deny her admission to partnership was based on sex and not a legitimate evaluation of her professional capabilities.
>
> If the Court should conclude (contrary to appellant's arguments) that Title VII does not apply to the three "partnership" claims asserted by plaintiff under any of the three legal theories which she has advanced, *plaintiff does not desire a remand of the court below in order to afford plaintiff an opportunity to try any other Title VII claims based on individual*

Count two alleged a violation of the Equal Pay Act, and count three alleged breach of contract.[5]

Due to the particularly sensitive nature of the discovery (the contents of the firm's partnership agreement) and the unique legal issue presented in count one, the parties and the District Court mutually agreed to limit initial discovery to information needed to determine the jurisdictional issue of Title VII. King & Spalding supplied an edited version of its partnership agreement in compliance with discovery requests as well as answers and objections to numerous interrogatories. All of this information and the briefs for this appeal were placed under seal to avoid any unnecessary disclosure.[6] In ruling on King & Spalding's motion to dismiss, the District Court also ruled against the plaintiff's request for additional discovery. Amidst the three-count complaint, sensitive discovery, the unique legal issue posed, and the professional courtesy extended by all involved, this Court is confronted with but a single narrow issue: whether Title VII applies to a law firm's decisions regarding its partners?

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episodes of sex discrimination that may have been practiced against her while she was an associate of King & Spalding.

Letter from Emmet J. Bondurant to Judges Tjoflat, Fay and Young (January 25, 1982) (emphasis supplied). In light of this correspondence, we find no jurisdictional barrier to our rendering a decision on the Title VII count limited solely to partnership decisions.

[5] We do not find any additional obstacle posed by the original existence of two other counts. According to the plaintiff's brief; "Counts Two and Three of the complaint, which alleged violations of the Equal Pay Act, 29 U.S.C. § 206(d)(1), and a contract claim, have been informally withdrawn and dismissed by plaintiff without prejudice." Brief for Appellant at 2 n.1. *See also* Letter from Hamilton Lokey to Judges Tjoflat, Fay and Young (January 18, 1982) and Letter from Emmet J. Bondurant to Judges Tjoflat, Fay and Young (January 25, 1982).

[6] The Equal Employment Opportunity Commission participated as amicus curiae in the District Court and submitted an amicus brief supporting the appellant's position in this appeal. At one point the Commission had requested access to all discovery. The District Court denied its request.

A dismissal under Fed.R.Civ.P. 12(b)(1) is proper only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim, which would entitle [her] to relief." *McLain* v. *Real Estate Board of New Orleans, Inc.*, [444 U.S. 232, 246, 100 S.Ct. 502, 511, 62 L.Ed.2d 441 (1980) (quoting *Conley* v. *Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957).] Appellant suggests that Title VII must be given the "broadest possible interpretation" in order to effectuate its purpose—to remedy acts of discrimination within the employment context. *Rogers* v. *EEOC,* 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied,* 406 U.S. 957, 92 S.Ct. 2058, 32 L.Ed.2d 343 (1972). Under such a broad reading and in conjunction with her altered characterizations of King & Spalding, she hopes to persuade us of Title VII's application to partnership decisions. Even under the most liberal reading we cannot find the requisite congressional intent to permit Title VII's intervention into matters of voluntary association. We can conceive no set of facts which would entitle her to relief under Title VII with respect to partnership decisions. This renders the dismissal of her claim proper.

Appellant prposes three bases upon which to find jurisdiction under Title VII: (1) partners at King & Spalding are equivalent to "employees" of a corporation thereby establishing the employment context for Title VII's application; (2) elevation to partnership is an "employment opportunity" or a "term, condition or privilege of employment" protected by Title VII; and (3) termination of employment as a result of failure to make partner falls within the ambit of an unlawful discharge prohibited by Title VII. Despite the alluring quality of her arguments, we are unpersuaded. An examination of her attempts to recharacterize the law firm partnership as a corporation reveals their transparent nature.

Partnership or Corporation?

The appellant argues the size and complexion of King & Spalding's partnership is more akin to a corporation possessing a separate and distinct identity and that its partners are more like employees than owners.* We are well aware that large law partnerships possess many attributes common to corporate forms of business. As appellant correctly points out, the United States Supreme Court has held that partnerships have "an established institutional identity independent of its individual partners." *Bellis* v. *United States*, 417 U.S. 85, 95, 94 S.Ct. 2179, 2187, 40 L.Ed.2d 678 (1974) (individual partner's fifth amendment privilege held inapplicable to prevent production of partnership records). For many purposes, such as the fifth amendment's protection, this "separate identity" will yield results similar to those for corporations, but not for Title VII purposes.

Next the appellant contends that because King & Spalding has a written partnership agreement, the firm has expressly altered its existence from a traditional common law partnership to the skeletal structure of a corporation. This argument is another attempt to equate partners of a large firm with employees of a corporation. We have reviewed the appellant's list of alleged alterations and find they do nothing more than clarify the internal structure of the firm. Under Georgia law "[a] partnership may be created either by written or parol contract." Ga.Code Ann. § 75-101 (1981). King & Spalding has reduced its partnership structure to writing; there is no merit to the contention that in doing so, it has unbeknownst to itself incorporated its partnership.

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* Under appellant's theory, if it can be shown that partners are employees of the partnership rather than owners, an employment relationship exists rendering Title VII applicable to partnership decisions since the decision would then be relegated to nothing more than a simple promotion.

Additionally, the appellant points out that the United States Supreme Court and the former Fifth Circuit[1] have held that part ownership of a business does not preclude a person's classification as an employee subject to federal employment legislation. *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir.), *rehearing en banc denied*, 494 F.2d 1296 (5th Cir. 1974). It would be unrealistic to assume a person cannot maintain a proprietary interest and simultaneously work in the business. Mutual exclusivity neither exists nor is required in a law firm in order for the firm to maintain its desired partnership structure. This lack of exclusivity, however, does not render the term "partner" equivalent to the term "employee" for purposes of Title VII.

Partner or Employee?

The status of "an employee under Title VII is a question of federal . . . law; it is to be ascertained through consideration of the statutory language of the Act, its legislative history, existing federal case law, and the particular circumstances of the case at hand." *Calderon* v. *Martin County*, 639 F.2d 271, 272-73 (5th Cir. 1981). Neither the statutory language nor the legislative history of Title VII greatly illuminate this otherwise gray area. First, Title VII merely defines an employee as "an individual employed by an employer." 42 U.S.C. § 2000e(f) (1976). Second, the legislative history reveals but a single remark. During the Senate Debate Senator Clark stated that the term "employer" was "intended to have its common dictionary

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[1] The Eleventh Circuit sitting en banc adopted the law of the Fifth Circuit as it existed on September 30, 1981 in *Bonner* v. *City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

meaning, except as expressly qualified by the Act."[9] 110 Cong.Rec. 7216 (Apr. 8, 1964).

Third, existing federal case law includes analysis under the "economic realities" test, traditional agency and partnership principles, and the four-part test set forth in *Calderon*.[10] *See, e.g., Lutcher* v. *Musicians Union Local 47*, 633 F.2d 880 (9th Cir. 1980) (Title VII); *Spirides* v. *Reinhardt*, 613 F.2d 826 (D.C.Cir.1979) (Title VII); *Burke* v. *Friedman*, 556 F.2d 867 (7th Cir. 1977) (Title VII); *Donovan* v. *Tehco, Inc.*, 642 F.2d 141 (5th Cir. 1981) (Fair Labor Standards Act).

The Seventh Circuit provides a most enlightening discussion of whether Title VII applies to an accounting firm operating as a partnership in *Burke* v. *Friedman*. Citing Fifth Circuit prece-

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[9] The appellant urges this Court to adopt an "economic reality" test for determining whether the partners at King & Spalding are "employees." The test is derived from the United States Suprme Court's decision in *NLRB* v. *Hearst Publications Co.*, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944), in which the Court applied the term "employee" as found within the National Labor Relations Act. The Court defined the term according to "the purpose of the Act and the facts involved in the economic relationship." *Id.* at 129, 64 S.Ct. at 859. The former Fifth Circuit recently employed this test in deciding whether an individual was an "employee" for purposes of the Fair Labor Standards Act. *Donovan* v. *Tehco, Inc.*, 642 F.2d 141 (5th Cir. 1981). Other courts have considered this approach under Title VII. The appellee, however, contends the term should be given its common dictionary meaning as suggested by Senator Clark in reference to the term employer. We find the *Calderon* test provides a more comprehensive standard by evaluating all relevant criteria.

[10] We are aware that *Calderon* dealt with the classification of "employee" for purposes of establishing whether the plaintiff qualified in order to maintain an action under Title VII, whereas we are faced with whether the individual members of the defendant partnership may be considered employees. Each question is jurisdictional in origin, however, and we find *Calderon's* test especially appropriate.

dent in recognition that "Title VII's definition of "employee" is not restrictive.' " the court applied traditional partnership principles and held that partners were not employees. *Id.* at 869 (quoting *McClure* v. *Salvation Army,* 460 F.2d 553 (5th Cir.), *cert. denied,* 409 U.S. 896, 93 S.Ct. 132, 34 L.Ed.2d 153 (1972)). In *Burke,* a female employee filed a sex discrmination action for wrongful discharge. Without counting the accounting firm's partners as employees, the partnership did not qualify as an "employer" since it employed less than fifteen "employees." While the precise issue varies from the issue before us, the Seventh Circuit has announced its hesitation to equate partners with employees. We have the same reluctance.

Fourth, the particular circumstances of this case are clear. King & Spalding operates as a partnership under the laws of Georgia. It files tax returns as a partnership. It is comprised of fifty active partners and employs approximately fifty associates along with other support personnel. It has a lengthy partnership agreement with detailed provisions as to profits, losses, withdrawal, dissolution, etc. But it is clearly a voluntary association of lawyers for the purpose of practicing law as joint venturers. The partnership is the appellant's employer; the partners own the partnership; they are not its "employees" under Title VII.

We find a clear distinction between employees of a corporation and partners of a law firm. In making this distinction, we do not presume to exalt form over substance. In this instance, however, the form *is* the substance, and we are unwilling to dictate partnership decisions under the guise of employee promotions protected by Title VII. The very essence of a partnership is the voluntary joinder of all partners with each other.

"But You Promised"

Appellant's second point concerns King & Spalding's alleged representations to her that in return for satisfactory work as an associate for a designated number of years, an invitation to

partnership would be forthcoming. She asserts this "promise" is a "term, condition or privilege of employment" protected by section 703(a)(1) and/or an "employment opportunity" protected by section 703(1)(2).[11] She suggests that as an associate/employee, she was "entitled" to the "promotion" to partnership upon satisfactory fulfillment of her duties and denial of partnership is a denial of an "employment opportunity." Relying on *Golden State Bottling Co., Inc.* v. *NLRB*, 414 U.S. 168, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973) and *NLRB* v. *Bell Aircraft Corp.*, 206 F.2d 235 (2d Cir. 1953), she advises us that should we decline to equate partners with employees, we may still find the "opportunity" for promotion within the statute's purview.

We have no quarrel with the premise that an "opportunity" can include promotion to a position beyond that of an "employee" covered by Title VII. But, once again, we decline to extend the meaning of "employment opportunities" beyond its intended context by encroaching upon individuals' decisions to voluntarily associate in a business partnership.

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[11] 42 U.S.C. § 2000e-2(a)(1) & (2) (1976) provide:

> (a) It shall be unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

For our purposes, we will simply refer to both sections as covering "employment opportunities."

In *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir.), *rehearing en banc denied*, 494 F.2d 1296 (5th Cir. 1974), the former Fifth Circuit held that election to a Board of Operatives had been appropriately labeled by the District Court as "a valuable term, condition, or privilege of employment." The case is unique, however, due to the manufacturing company's organizational structure. The company's owner had devised an unusual management plan which set up a Board of Management and a Board of Operatives. The Board of Operatives served as a conduit between the employees and the management board. Employees working in nonsupervisory positions were eligible for election to the Board of Operatives. Upon his death the owner bequeathed all outstanding common stock to the boards as trustees for the employees. Prior to the case, blacks had been intentionally excluded from eligibility for election to the Board of Operatives. Because the court found election to the Board of Operatives to be "a valuable term, condition, or privilege of employment," it ordered the discrimination terminated.

The appellant submits that *Pettway* demonstrates the former Fifth Circuit's willingness to mandate nondiscriminatory elections to positions of ownership from an employee status. The decision in *Pettway* does not possess such elasticity. The employees remained employees even while serving on the board and never actually "owned" the company in their individual capacities, but acted "in trust" for all present and future employees. Furthermore, the owner's elaborate management structure caused election to the board to become a "valuable term, condition, or privilege of employment." We do not find *Pettway* controlling in the issue now before us.

We are also cognizant of *Lucido* v. *Cravath, Swaine & Moore*, 425 F.Supp. 123 (S.D.N.Y.1977). In *Lucido*, the District Court denied a motion to dismiss a complaint alleging an unlawful discharge of an associate on the basis of his national origin and religion. Many of the allegations in the appellant's complaint mirror allegations described in *Lucido*.

Among them was a denial of partnership. "In [that] court's view, . . . the opportunity to become a partner at Cravath was a 'term, condition or privilege of employment' and an 'employment opportunity.' " *Id.* at 127. This statement could be classified as dicta since the court had already determined that the allegation of an unlawful discharge stated a claim for relief under Title VII. In any event, we respectfully disagree with that court's statement.[12] Decisions as to who will be partners are not within the protection of Title VII.

We do have serious concerns about any representations made to the appellant regarding her future consideration for partnership. We are well aware of the significance given a firm's partnership policy by a prospective associate in determining the proper career choice. If in fact these representations were deceptively made, then perhaps an action in breach of contract or misrepresentation may provide a more appropriate vehicle for the appellant to drive toward a legal remedy.[13]

In Through The Back Door

In her third attempt to establish a cause of action under Title VII, the appellant has attempted entry through the proverbial back door. She contends that regardless of our decision on the partnership issue she has been denied "employment oppor-

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[12] It appears the *Lucido* case has come to an end. According to the Clerk's Office for the Southern District of New York, the case was dismissed with prejudice on July 28, 1981.

[13] The appellant alleges King & Spalding also deprived her of employment opportunities by giving her less responsible work assignments, which prevented her from proving her value to the firm. *See Satz* v. *ITT Financial Corp.*, 619 F.2d 738 (8th Cir. 1980). Because she has elected to refrain from litigating these individual instances as violations of Title VII, we go no further.

tunities" in the firm's implementation of its "up or out" policy. In essence, she asserts the effect of the denial of partnership, subsequent termination of employment, deprived her of employment opportunities (frozen salary) and adversely affected her status as an employee (termination). 42 U.S.C. § 2000e-2(a)(2) (1976). While discriminatory termination alone may have stated a cause of action under Title VII for an unlawful discharge, *Lucido* v. *Cravath, Swaine & Moore,* when the termination is a result of the partnership decision, it loses its separate identity and must fall prey to the same ill-fate as her original attempt to apply Title VII to partnership decisions.

Prospective associates are apprised not only of their potential for partnership, but also of the consequences to be suffered following an unfavorable decision. Just as she accepted a representation made to her concerning partnership consideration, appellant likewise assumed the risk that an unfavorable decision would set in motion the termination procedure under the firm's "up or out" policy.

The End

Appellant creatively designed a new jurisdictional adventure for this Court to undertake. We have explored the new and intriguing trails, but find that each trail comes to a dead end. Title VII does not apply to those decisions dealing with the formation of partnerships. The dismissal is affirmed.

TJOFLAT, Circuit Judge, dissenting:

In 1972, Elizabeth Hishon accepted a position as an associate with King & Spalding, a large Atlanta law firm which operates as a general partnership. The partnership consists of approximately fifty active lawyers and employs approximately fifty additional lawyers as associates. At the time Hishon joined the firm, an associate was subject to discharge at the end of her sixth year. The firm also maintained an "out or up" policy whereby an associate who was not discharged at the end of the sixth year was invited to become a partner in the firm.

In May 1978, the partnership evaluated Hishon, along with other associates hired in 1972, and decided to discharge her from the firm; this of course rendered Hishon ineligible for partnership. She was promptly notified, and was granted the usual period of time to secure other employment. Eight months later, Hishon requested reconsideration of her discharge. At the conclusion of the May 1979 associate review meeting, the result was the same—Hishon's discharge was confirmed. She left the firm on December 31, 1979.

This account of the process culminating in Elizabeth Hishon's departure from King & Spalding differs from the majority's only verbally. See *ante* majority opinion at 1024. The majority says that King & Spalding decided not to invite Hishon to become a partner, and that by operation of the firm's uniformly applied "up or out" policy, Hishon incidentally had to leave the firm. The alternative account says that King & Spalding decided to fire Hishon, and that she was consequently not eligible for partnership.

The alternative is offered *not* to insinuate that the partners conspired to get rid of Hishon under the guise of denying her partnership. Rather, it is offered to suggest that in reviewing the district court's dismissal of Hishon's complaint, we should be concerned with the reality of the events alleged, and not with the conventional verbal garb in which those events are cloaked.

What "actually happened" is neither what the majority says happened nor what the alternative says happened. So far as we should be concerned, what happened is that the King & Spalding partnership, having reviewed and evaluated Hishon's performance, made a decision which they communicated to her. The *direct* consequence of this decision, mediated neither by Hishon's will nor by any cause other than the partnership itself, was to deny Hishon membership and to terminate her employment. Regardless the words by which we know the decision, the decision was, undeniably, to discharge Hishon.

Hishon alleges, and we must assume, that King & Spalding discriminated against her on account of her sex by its decision to deny her partnership and to terminate her employment. The majority holds that ". . . when the termination is a result of the partnership decision, it loses its separate identity and must fall prey to the same ill-fate as her original attempt to apply Title VII to partnership decisions." This is too glib for me. While I agree that Title VII would not apply to the discrete decision whether to take on a new partner,[1] when the partnership decision inextricably and inevitably *is* a decision whether to terminate employment, I would hold that Title VII applies. Since this is such a case, I would reverse the district court's dismissal of Hishon's complaint and remand for further proceedings. I dissent.

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[1] For example, Title VII would not apply to the partnership's invitations to lawyers who were not associates in the firm.

APPENDIX B

Elizabeth Anderson Hishon, Plaintiff v. King & Spalding, Defendant.

United States District Court, Northern District of Georgia, Atlanta Division. Civil Action No. C80-326A. November 25, 1980.

EDENFIELD, D.J.: Plaintiff in this action seeks relief for alleged sex discrimination because she was not elevated to partnership in the defendant law firm. The case is before the court on defendant's motion to dismiss on the ground that in selecting partners the defendant is not subject to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17, and, more immediately, on plaintiff's prayer for further discovery as to the question of coverage under the Act. Both parties have filed voluminous briefs nominally addressed to the discovery question but which explore the whole coverage issue from almost every conceivable angle. The court is therefore now prepared to rule on both motions.

In her briefs on coverage plaintiff does not contend that Title VII applies to all law partnerships in selecting new partners. What she does contend is that this particular partnership, because of its age, its size, and the provisions of its partnership agreement, is not in substance a partnership at all but more nearly resembles a giant corporation, operating under a trade name (both of the partners for whom it was named having died long ago) and having a virtually perpetual existence as a separate institution quite apart from its individual members. For this reason she says new and junior partners (at least) are nothing more than employees and hence amenable to Title VII.

The defendant in its brief admits that as a partnership King and Spalding has an existence apart from its individual members but says, first, that partners are not "employees" within the

meaning of Title VII and, second, that admission to partnership is not a "term, condition or privilege of employment," to which that Act relates.

In the view of the court these contentions raise two legal questions: (1) Could Congress, under the Constitution, subject voluntary partnerships to Title VII; and (2) If so, did they intend to do so in enacting that chapter? In the opinion which follows the court will consider the answer to both questions, but its final conclusion will rest on the answer to question (2).

In 1964 in his concurring opinion in *Bell* v. *Maryland,* 378 U.S. 226, 313 (1964), and in distinguishing discrimination in places of public accommodation, Mr. Justice Goldberg said:

> Prejudices and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and *business partners* solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

(Emphasis added.)

Admittedly, the kaleidoscope of civil rights has changed greatly since 1964, but until this very hour, so far as the court can find, private clubs and associations—social, business and otherwise—still enjoy this same constitutional protection and immunity or "freedom of association", some of them in fact being created for and dedicated to the protection and advancement of only one race or one sex; *e.g.,* the NAACP, the International Ladies' Garment Workers' Union, and the National League of Women Voters. *See NAACP* v. *Alabama,* 357 U.S. 449 (1958). Admittedly, many of these voluntary associations have abolished discrimination and accept members of both sexes and all races. So have many private clubs and so have many law partnerships, but they have done so voluntarily and not because of any recognition that the law requires it.

Undeniably, a private professional partnership is a voluntary association. The requirements of "voluntariness" and "association" are both part of any dictionary definition of the word "partnership" itself. Plaintiff's emphasis on the composition and internal arrangements of this particular partnership cannot alter this inescapable conclusion. King and Spalding is a partnership, created and perpetuated as such and subject to the partnership laws of Georgia and the United States. The legal characterization of what an entity is, of course, is purely a question of state law, and anyone denying that King and Spalding is a partnership would be laughed out of any court in Georgia, as well as the Internal Revenue Service, where it files partnership returns.

These observations effectively dispose of plaintiff's prayers for further discovery. In the further discovery sought plaintiff seeks to inquire into such matters as the amount of capital contribution required of the defendant's new partners, the amount of the firm's surplus and the interest of the various partners therein, the division of partnership points among each class of partners, and the amount of income derived therefrom by each. The answers to these questions would very likely make interesting reading to many people in Atlanta, to the members of the Atlanta bar, and to other competitors of King and Spalding, including both counsel in this case, but in the view this court entertains of this case they could make no difference in its outcome and consequently the information sought is simply none of plaintiff's business. The prayer for further discovery is therefore DENIED.

The Supreme Court has, of course, fully recognized "freedom of association." Unfortunately, however, it has not dealt with the subject in the context of business and commercial partnerships, except for the comments of Mr. Justice Goldberg

in *Bell* v. *Maryland, supra.* In *NAACP* v. *Alabama, supra,* at 460, Justice Harland for the majority, and after recognizing such freedom as a constitutional right, did say:

> Of course it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

In a very real sense a professional partnership is like a marriage. It is, in fact, nothing less than a "business marriage" for better or worse. Just as in marriage different brides bring different qualities into the union—some beauty, some money, and some character—so also in professional partnerships, new mates or partners are sought and betrothed for different reasons and to serve different needs of the partnership. Some new partners bring legal skills, others bring clients. Still others bring personality and negotiating skills. In both, new mates are expected to bring not only ability and industry, but also moral character, fidelity, trustworthiness, loyalty, personality and love. Unfortunately, however, in partnerships, as in matrimony, these needed, worthy and desirable qualities are not necessarily divided evenly among the applicants according to race, age, sex or religion, and in some they just are not present at all. To use or apply Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings.

It is also interesting that it is in connection with marriage that the Supreme Court next mentioned "freedom of association." In *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), it said:

> This law [relating to contraceptives], however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation. . . . In NAACP v. Alabama we protected the "freedom to associate and privacy in one's associations," noting that

> freedom of association was a peripheral First Amendment right. . . . The right of "association" like the right of belief is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. . . .
>
> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

It is against this background then that we must next address the question whether Congress, by the language used, intended to include the formation of partnerships, and the admission of new members to them, under Title VII in the first place. On this subject the language of the law is completely silent or ambiguous. The Act speaks only in terms of employment relationships and prohibits discrimination with respect to "compensation, terms, conditions or privileges of employment" and prohibits actions which would adversely affect one's "status as an employee." The word "employment" is not defined, "employee" is defined only as one "employed by an employer." "Employer" is likewise not defined except that in the legislative history it is said the word was to be given its "common dictionary meaning, except as qualified by the Act." Several cases have held that under Title VII "employment" meant the same thing it did at common law.

In this confusion the reported precedents help a little, but not much. In *Burke* v. *Friedman* [14 EPD ¶ 7629], 556 F.2d 867 (7th Cir. 1977), the Seventh Circuit held (headnote 2):

> Partners cannot be regarded as employees rather than as employers who own and manage operation of business and, hence, cannot be included as employees for obtaining necessary subject matter jurisdiction under statute authorizing a discriminatory employment suit against an employer engaged in an industry affecting commerce who have 15 or more "employees" for each working day in each of 20 or more calendar weeks in current or preceding calendar years. Civil Rights Act of 1964, § 701(b) as amended 42 U.S.C.A. § 2000e(b).

In the body of the opinion the court also said:

> [S]ection 6 of the Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." Partners manage and control the business and share in the profits and losses. [Citations.] In light of the foregoing, we do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business.

At 869. Admittedly, although this case did involve the rights of partners inter se, it did not involve or discuss the case of an associate employee who complains of being denied partnership status.

The case of *Lucido* v. *Cravath, Swaine & Moore* [13 EPD ¶ 11,432], 425 F.Supp. 123 (S.D. N.Y. 1977), cited by plaintiff, can be distinguished on several grounds: In the first place, the first and main complaint of plaintiff there was that he was discharged *as an associate* because of his race and religion. This, of course, made out a Title VII claim by itself; but here, that is not what plaintiff complains of. She does not seek damages or reinstatement for being discharged as an associate,[1] her com-

plaint is that she was not made a partner. It is true that in divisions [7] and [8] of that opinion the district judge goes on to say that denial of promotion to partnership might itself be a Title VII violation. But having already found a violation for firing the associate, the court had to deny the motion to dismiss in any event and these remarks appear to be dictum. In the same portions of the opinion the court attempts to dispose of the freedom of association defense by asserting that such right is limited to social and fraternal organizations, not businesses. In the first place, not one of the Supreme Court cases cited as authority for that proposition either states or supports the distinction sought to be drawn; none of them dealt with either partnerships or Title VII but with schools and school books. Finally, and with all respect, this court is not bound by the opinion of that court anyway.

The author of *Lucido,* in reaching his conclusion, also relies on the acceptable proposition that Title VII applies to the promotion of one covered by the Act to a higher position which is not covered. But in applying the rule, the author erred, in the opinion of this court, because he confuses the process of promotion with the process of election. When a law firm associate becomes a partner he is not *promoted* to partnership, he is *elected* to partnership. The difference, this court thinks, should be obvious. A promising young lawyer who is elected to partnership is comparable to a promising young engineer working for the Chevrolet Division of General Motors who is elected to the board of directors of that corporation. This comparison, if apt, goes far toward resolving this case; this for the reason that the legislative history of Title VII clearly shows that the chapter was not intended to apply to the election of corporate directors.[2]

Nor does this case fall within the situation recently referred to by Judge Moye of this court,[3] where failure to promote or elect would destroy or jeopardize the future right of an employee to pursue his chosen life profession or occupation. On the contrary, just as a promising young engineer who is *not* elected to

the board of General Motors remains just as much a promising young engineer as before, so when plaintiff was *not* elected to partnership she remained just as much a promising young lawyer as before, as evidenced by the fact that she promptly made a connection with another large Atlanta firm. Defendant's "up or out" policy with respect to associates (of which plaintiff complains) is exactly the same, in principle, as the case of a young singer who tries out for the Metropolitan Opera or of an athlete who tries out for the Olympic Team and is not accepted. He or she is still just a much as genius as before but will simply have to seek stardom elsewhere. Many find it. It is an interesting sidelight, in this connection, that both leading counsel in this case, certainly among Atlanta's best, were once promising young associates in the same prestigious Atlanta firm. One was elected to partnership; the other was not. It may be interesting to speculate why both were not elected, but neither would every claim it was because of race, sex, age or religion. It is also irrelevant to this opinion, but is somewhat supportive, to note that since the filing of this action King and Spalding now has a female partner.

In the end, then, the court faces this dilemma: (1) If the court finds that the case is covered by Title VII the defendant's constitutional right to freedom of association is then thrown into head-on conflict with plaintiff's constitutional right not to suffer discrimination in the terms, conditions and privileges of her employment; (2) if the court construes the Act as not covering plaintiff's claim, then there is no constitutional problem and the court should dismiss the case for want of subject-matter jurisdiction. To the court, while the right of defendant to freedom of association seems clear, the coverage of the Act seems doubtful and obscure. The court is humbly aware that in reaching this conclusion it may have erred. In considering this possibility, the court considered a balancing process which

would give effect to both constitutional rights by allowing the case to proceed but would require the plaintiff, in such rare instances, to show by clear and convincing proof that, irrespective of all other justifications claimed by defendant, naked discrimination was the sole and producing cause of plaintiff's rejection as a partner. The court, however, could find no hint of any authority for a trial court to so alter the burden of proof. All of these questions will have to be resolved by a higher authority, legislative or judicial. In the meantime, the court concludes that it has no subject-matter jurisdiction of plaintiff's claim and the case is, therefore,

Dismissed.

—Footnotes—

[1] An unsigned draft of this order was mailed to counsel on November 10, 1980, along with a letter inquiring whether counsel wished a further hearing or argument on the question of coverage. In a reply from plaintiff dated November 18 requesting no further hearing plaintiff, however, does point to what she claims to be a misstatement of her contentions. In this letter plaintiff says that, contrary to the statement in the opinion, she *does* also complain of her discharge as an associate.

Despite the tenacity of plaintiff, the logic behind this contention simply will not cut the mustard under the undisputed facts. Admittedly, it was the policy of defendant law firm against permanent associates and its "up or out" rule with respect to them which caused plaintiff to lose her job as an associate. These long-standing policies of defendant have been uniformly applied by it over the years, for the most part against associates who were male only. Neither in her pleading, briefs nor arguments does plaintiff even whisper or suggest that such applications by defendant were in any way based on sex. The same provisions caused two males to leave at the same time as plaintiff, and plaintiff admits that, standing alone, these policies are not sexually discriminatory and were not discriminatorily applied by defendant. What she does say is that since her failure to make partner was in this case based on sex discrimination, and since this in turn triggered the "up or out" rule with respect to her, the "up or out" rule itself thereby becomes discriminatory in this instance. In other words, to make out discrimination under "up or out" she must first make out discrimination in denial of partnership. But having failed to establish her premise of actionable discrimination in denial of partnership, her second conclusion, based on that premise, cannot follow.

[2] 110 Cong. Rec. 7218 (1964).

[3] Naismith v. Professional Golfers Ass'n, 85 F.R.D. 552 (N.D. Ga. 1979).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-9021

D.C. Docket No. CV80-326-A

Elizabeth Anderson Hishon,
Plaintiff-Appellant,

vs.

King & Spalding, a Partnership,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia Before TJOFLAT and FAY, Circuit Judges, and YOUNG*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, AFFIRMED;

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* Honorable George C. Young, U.S. District Court Judge for the Middle District of Florida, sitting by designation.

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

June 17, 1982

TJOFLAT, Circuit Judge, Dissenting.

ISSUED AS MANDATE: September 9, 1982

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-9021

Elizabeth Anderson Hishon,
Plaintiff-Appellant,

vs.

King & Spalding, a partnership,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Filed September 9, 1982)

(Opinion June 17, 11 Cir., 1982, ____ F.2d ____).

(September 9, 1982)

Before TJOFLAT and FAY, Circuit Judges and YOUNG*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court

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* U.S. District Judge for the Middle District of Florida, sitting by designation.

having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ PETER T. FAY
United States Circuit Judge

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